STATE OF MICHIGAN

COURT OF APPEALS

GARY BRUGGER,

Plaintiff-Appellant,

v

CITY OF HOLLAND,

Defendant-Appellee.

UNPUBLISHED
May 29, 2014

No. 313925
Ottawa Circuit Court
LC No. 12-002711-CZ

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

GLEICHER, P.J. (*dissenting*).

Plaintiff Gary Brugger and defendant City of Holland entered into a just cause employment agreement. More accurately, the City's employee handbook purported to establish a just cause employment relationship. In a paragraph titled, "'Just Cause' Employment," the handbook provided that Brugger would not be discharged absent "just cause." But in the next paragraph, the City granted unto itself "sole discretion" to determine "whether the employee's action or conduct warrants discharge."

The majority discerns no contradiction inhering in these two provisions. It holds that the "sole discretion" provision extinguishes the authority of a judge or jury to "second-guess" the City's employment decision. According to the majority's logic, the City's subjective belief that just cause existed for termination is good enough – even if the decision was actually arbitrary, capricious, or made in bad faith.

I believe that by promising Brugger just cause employment, the City forfeited the ability to insulate its termination decision from judicial review, and respectfully dissent.

Relying primarily on *Thomas v John Deere Corp*, 205 Mich App 91; 517 NW2d 265 (1994), the majority concludes that neither this Court nor a jury may review the City's decision to terminate Brugger. In my view, the majority has not only misinterpreted nonbinding language in *Thomas*, but has disregarded our Supreme Court's binding opinion in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579; 292 NW2d 880 (1980).

In *Toussaint*, 408 Mich at 619, our Supreme Court highlighted that "[i]f there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place." The Court emphasized, "Having announced the policy, presumably with a view to obtaining the benefit of

improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory." *Id.* The Court proceeded to set forth in the clearest possible terms an extraordinarily pertinent example of an illusory promise:

> We all agree that where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work. *A promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the employer's decision if the cause contract is to be distinguished from the satisfaction contract.* [*Id.* at 621 (emphasis added).]

The Supreme Court's commandment that "[t]here must be some review of the employer's decision" in the just cause employment setting constitutes controlling authority. The language from *Thomas* cited by the majority does not. Unlike the written contract promising Brugger just cause employment, the plaintiff if *Thomas* "had not been explicitly promised that he could be fired only for just cause." *Thomas*, 205 Mich at 94.[1] Thus, *Thomas* simply does not apply to this case.

Toussaint stands for the proposition that when a just cause relationship has been contractually established, a jury or judge must decide whether just cause existed for an employee's termination from employment: "The jury as trier of fact decides whether the employee was, in fact, discharged for unsatisfactory work." *Toussaint*, 408 Mich at 621. *Toussaint* teaches that a promise of just cause employment must be enforced by someone other than the employer:

> Where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable. An instruction which permits the jury to review only for reasonableness inadequately enforces that promise.
>
> In addition to deciding questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job? [*Id.* at 623 (citations omitted).]

[1] The *Thomas* Court failed to describe the contract at issue, other than to analogize it to the contract construed in *Rood v Gen Dynamics Corp*, 444 Mich 107, 119-127; 507 NW2d 591 (1993). The pages of *Rood* cited in *Thomas* concern an alleged *oral* promise of just cause employment. In *Rood*, the Supreme Court rejected that the statements objectively manifested an intent that his employment would legally qualify as for cause.

As *Toussaint* recognized, permitting an employer to maintain "sole discretion" to discharge an employee eviscerates the "just cause" employment clause. "Sole discretion" clauses render "just cause employment" meaningless. Armed with a "sole discretion" clause, the City can fire at will, despite pledging to terminate only for cause. After all, who will know whether cause existed? Having announced a just cause termination policy, the City is obligated under *Toussaint* to permit a jury to assess the reasonableness of its termination decision. I would reverse for a trial.

/s/ Elizabeth L. Gleicher